

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)
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Amendment of Section 1.420(f)
of the Commission's Rules
Concerning Automatic Stay of
Certain Allocation Orders)
_____)

MM Docket No. 95-110

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To: The Commission

COMMENTS OF KRTS, INC.

KRTS, Inc. ("KRTS"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby comments upon the Commission's Notice of Proposed Rulemaking, FCC 95-277 (released July 21, 1995), in the above-captioned docket (the "NPRM"). In the NPRM, the Commission proposes to eliminate the automatic stay triggered by the filing of a petition for reconsideration or application for review of any Commission order modifying an authorization to specify operation on a different channel. KRTS strongly supports the Commission's proposal because the automatic stay impedes meritorious channel modifications and encourages meritless challenges to such channel modifications, and because the automatic stay is unnecessary to protect legitimate reconsideration requests concerning channel modifications.

BACKGROUND

KRTS owns KRTS(FM), a for-profit classical music radio station licensed on Channel 221C2 at Seabrook, Texas. On June 2, 1995, KRTS suspended operations because

its signal did not permit it to reach enough of its target audience in the Houston metropolitan area to remain financially viable.

More than four years ago, KRTS sought to remedy its signal problem by requesting that Channel 221C1 be substituted for Channel 221C2 at Seabrook and that KRTS' license be modified to operate on the higher powered channel. In response, the FCC's Allocations Branch issued a Notice of Proposed Rulemaking proposing to adopt the allotment change.^{1/} Helen Maryse Casey ("Casey"), owner of KCEY(FM), Huntsville, Texas, filed a counterproposal to upgrade her station from channel 259A to 258C2.^{2/}

The Commission determined that, because of minimum distance requirements designed to prevent broadcast interference, it could not grant both proposals.^{3/} The Commission further concluded, based on its own engineering and population analyses, that KRTS' proposal better served the public interest because it would bring the benefits of a new service to a greater number of people than would Casey's proposal.^{4/} Accordingly, in September 1992, the Commission denied Casey's proposal, granted KRTS' proposal, and modified KRTS' license accordingly.^{5/}

^{1/} See In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, 6 FCC Rcd 3665 (1991) ("KRTS NPRM").

^{2/} See In Re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, 7 FCC Rcd 5613 (¶ 2) (1992) ("KRTS Upgrade Order").

^{3/} Id., 7 FCC Rcd at 5615 (¶ 8).

^{4/} Id., 7 FCC Rcd at 5615 (¶¶ 8-10).

^{5/} Id., 7 FCC Rcd at 5615 (¶¶ 12, 14).

In October 1992, Casey filed an application for review of the Commission's decision.^{6/} Pursuant to Section 1.420(f) of the FCC's rules, the KRTS allotment upgrade was automatically stayed,^{7/} and KRTS was unable to proceed with its much-needed upgrade. KRTS vigorously opposed the application for review, and filed papers to that effect.^{8/} Nonetheless, three years after grant of KRTS' modification, the automatic stay remains in place because the Commission has yet to rule on Casey's Application For Review.^{9/}

DISCUSSION

In the NPRM, the Commission recognizes that the automatic stay impedes expedited "provision of expanded service to the public "^{10/} KRTS' experience demonstrates that the Commission is correct. The mere filing of Casey's application for review has, for three years, deprived at least 256,984 Texas residents^{11/} of the benefits of KRTS' expanded service. Moreover, KRTS' inability to construct the new facility authorized nearly three years ago has now resulted in the shut down of the station entirely,

^{6/} See Casey Application for Review, MM Docket No. 91-180 (filed October 13, 1992.)

^{7/} Although the rule itself applies only to petitions for reconsideration, FCC Staff has interpreted the rule as applicable to applications for review as well. See NPRM, 95-277, slip op. at ¶ 4 citing Arlington, Texas 6 FCC Rcd 2050, 2051 n.2 (1991).

^{8/} See, e.g., KRTS Opposition to Application for Review, MM Docket No. 91-180 (filed November 18, 1992).

^{9/} KRTS remains hopeful that denial of the pending Application for Review will permit it to go forward with its facilities modification and resume broadcast service.

^{10/} NPRM, 95-277, slip op. at ¶ 1.

^{11/} KRTS Upgrade Order, 7 FCC Rcd at 5615 (¶ 9).

thereby depriving all of KRTS' listeners of their major source of classical music and arts programming.

The Commission also recognizes that the automatic stay provides an "incentive for the filing of petitions for reconsideration [and applications for review] that are largely without merit."^{12/} KRTS' experience demonstrates this point as well. To wit, even if Casey's Application for Review ultimately is denied, as KRTS expects, the delay caused has demonstrated to others the potential benefits of filing an opposition -- even if it is without merit. This demonstration serves as an incentive for meritless filings in the future. Such meritless filings not only impede beneficial channel modifications that expand radio service and improve spectral efficiency, but also cause unnecessary expense for parties and the Commission.

Finally, the Commission correctly notes that the elimination of the automatic stay will not prejudice those challenging initial staff decisions to grant channel modifications.^{13/} Even without the automatic stay, interested parties have multiple levels of protection. First, such parties are protected by the rules requiring the Commission to notify station licensees and construction permittees affected by a proposed channel modification and allow such parties to protest the proposed modification.^{14/} These rules

^{12/} NPRM, 95-277, slip op. at ¶¶ 1, 6.

^{13/} NPRM, 95-277, slip op. at ¶¶ 7, 8.

^{14/} 47 C.F.R. §§ 1.87(a), (b).

are typically carried out through order to show cause^{15/} and notice of proposed rulemaking procedures.^{16/} Through these procedures, the Commission gathers facts and analysis that enable it to render a sound initial decision on whether to grant a channel modification.^{17/} For example, the Commission decided KRTS' proceeding only after reviewing extensive pleadings, "carefully reviewing the proposals" and conducting its "own engineering and population analyses of the proposals."^{18/} The effectiveness of these rules is demonstrated by the fact that most decisions of the FCC's Allocations Branch are ultimately affirmed.^{19/} As a result, in most cases granting channel modifications, the automatic stay merely delays initiation of upgraded service.

Second, those who have meritorious reasons for opposing allotment upgrades are further protected because the Commission naturally will continue to consider petitions for reconsideration and applications for review on their merits. Licensees who proceed despite such filings will "bear the risk of an adverse final decision, and must take whatever steps are

^{15/} See, e.g., In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, 7 FCC Rcd 2109 (1992).

^{16/} See, e.g., KRTS NPRM, 6 FCC Rcd 3665. See also 47 C.F.R. §1.87(b).

^{17/} This fact gathering and analysis is further necessitated by the rule requiring the channel modification order to "include a statement of the findings and the grounds and reasons therefor." 47 C.F.R. § 1.87(i).

^{18/} KRTS Upgrade Order, 7 FCC Rcd at 5615 (¶¶ 8, 9).

^{19/} As the Commission points out, "[o]nly a very small percentage of . . . petitions [for reconsideration] or applications for review are ultimately successful." NPRM, 95-277 slip op. at ¶ 6.

necessary to comply with the final order."^{20/} This approach reasonably permits licensees to improve their service expeditiously based on their own evaluation of the risk of reversal -- without being needlessly hamstrung by delays that have no relationship to the merits of the upgrade. In close cases, the proponent of the modification may decline to proceed because it is unwilling to bear the risk of proceeding in reliance on a controversial or questionable initial staff decision. In such cases, the purpose of the automatic stay would still be served because the status quo would be maintained during consideration of the appeal.^{21/}

Because these protections already apply to challengers in pending proceedings, KRTS strongly supports the Commission's proposal to not only eliminate the automatic stay prospectively, but also with respect to pending proceedings.^{22/}

CONCLUSION

KRTS' experience demonstrates the harsh consequences that the automatic stay can have in the real world. Improved service can be delayed interminably in spite of an FCC staff decision that the improved service would serve the public interest better than any alternative proposal. Even without the automatic stay, multiple levels of protection for challengers of initial channel modification decisions will remain. Given these protections,

^{20/} NPRM, 95-277 slip op. at ¶ 8. See also Meridian Communications, 2 FCC Rcd 5904 (Rev. Bd. 1987) (as a matter at law, a grant does not become final until any outstanding petitions for reconsideration are adjudicated).

^{21/} As yet a third level of protection, the Commission would retain its authority "to impose a stay in individual cases where circumstances warrant." Id., at ¶ 8.

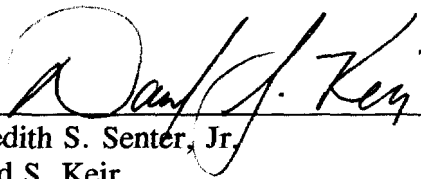
^{22/} Id., at ¶ 9.

the public interest will be well served by eliminating the stay, and by lifting all Section 1.420(f) stays in pending proceedings.

Respectfully submitted,

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